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COMMENTS

TAX GROSS-UPS: A PRACTICAL GUIDE TO ARGUING AND CALCULATING AWARDS FOR ADVERSE TAX CONSEQUENCES IN DISCRIMINATION SUITS

Tim Canney⁺

In 1990, finding that “discrimination against individuals with disabilities persists in such critical areas as employment,”¹ Congress passed the Americans with Disabilities Act (ADA).² Congress included the remedies provided in Title VII of the Civil Rights Act of 1964 (1964 CRA) to enforce the ADA.³ Title VII’s intentionally broad language allows a court hearing an employment discrimination case to grant “any other equitable relief” that it deems “appropriate.”⁴ Courts utilize this power to “make persons whole for injuries suffered on account of unlawful employment discrimination.”⁵ Yet, there is disagreement as to how far a court may—and should—extend its equitable power in these make-whole situations.⁶

In a much different area of American law, the United States Constitution grants Congress the “[p]ower [t]o lay and collect [t]axes,”⁷ both generally and “on incomes, from whatever source derived.”⁸ Controversy arises when some perceive that vulnerable members of society receive unfair tax treatment.⁹ A

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1. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(a)(3), 104 Stat. 327, 328 (codified at 42 U.S.C. § 12101(a)(3) (2006)).

2. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2006 & Supp. II 2008)).

3. 42 U.S.C. § 12117 (making available the remedies in 42 U.S.C. §§ 2000e-4 to -9 for violations of the ADA).

4. 42 U.S.C. §2000e-5(g)(1).

5. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

6. *See infra* Part I.A.2.

7. U.S. CONST. art. I, § 8.

8. U.S. CONST. amend. XVI.

9. *See, e.g.,* Harvey E. Brazer, *The Federal Income Tax and the Poor: Where Do We Go From Here?*, 57 CAL. L. REV. 422, 441 (1969) (discussing, in part, how tax exemptions for dependent children provide the least savings benefits to low-income families); Lawrence Zelenak, *Of Head Taxes, Income Taxes, and Distributive Justice in American Health Care*, 69 LAW & CONTEMP. PROBS. 103, 119–20 (2006) (discussing unfair tax treatment in healthcare).

recent debate has centered on one of the most vulnerable of the taxpaying citizenry: a middle-aged cancer survivor alleging employment discrimination under the ADA.¹⁰

In 1998, Joan Eshelman underwent chemotherapy treatment after being diagnosed with breast cancer.¹¹ After beating her cancer, Eshelman returned to work but was eventually fired.¹² Her termination sparked a discrimination lawsuit that would test the limits of remedies available to plaintiffs alleging employment discrimination.¹³ After Eshelman prevailed at trial,¹⁴ her employer appealed to the Third Circuit.¹⁵ The Third Circuit affirmed the jury lump-sum backpay award—that is, the salary Eshelman would have received during the time after her termination.¹⁶ The Third Circuit also affirmed the jury's additional award, known as a "gross-up," used to offset Eshelman's increased tax liability for receiving a lump sum of several years' backpay.¹⁷ In so holding, the Third Circuit joined the Tenth Circuit's finding in *Sears v. Atchison, Topeka & Santa Fe Railway (Sears II)* that tax gross-up awards are an appropriate use of Title VII's broad equitable provisions to return the plaintiff to the status quo.¹⁸ The District of Columbia Circuit, however, determined in an Age Discrimination in Employment Act (ADEA) case that such tax-burden awards are not appropriate remedies within a district court's discretion.¹⁹ The split among the circuits as to whether a court can grant gross-up awards demonstrates uncertainty over the broad language of Title VII.²⁰

This Comment examines the development of the remedies available in modern discrimination suits under Title VII and its statutory progeny. First, it evaluates the relatively vague and sparse discussion of tax gross-up awards by

10. *Eshelman v. Agere Sys., Inc. (Eshelman I)*, 554 F.3d 426, 430 (3d Cir. 2009).

11. *Id.*

12. *Id.* at 430–32.

13. *See id.* at 432.

14. *Eshelman v. Agere Sys., Inc. (Eshelman I)*, 397 F. Supp. 2d 557, 575 (E.D. Pa. 2005) (upholding the jury verdict in favor of Eshelman and denying the defendant's motion for judgment as a matter of law).

15. *Eshelman II*, 554 F.3d at 430.

16. *Id.* at 441–43; *cf.* HENRY H. PERRITT, JR., CIVIL RIGHTS IN THE WORKPLACE § 4.01[B] (3d ed. 2001) (discussing remedies available under Title VII, including backpay awards and judicial interpretation).

17. *Eshelman II*, 554 F.3d at 441–43. Courts award tax gross-ups to offset the resulting increased tax burden incurred by prevailing plaintiffs for lump-sum backpay awards because such awards are taxable as gross income in the year of payment. *See* Rev. Rul. 78-336, 1978-2 C.B. 256 (ruling that backpay awarded to a dismissed federal employee was taxable in the year paid).

18. *Sears v. Atchison, Topeka & Santa Fe Ry. (Sears II)*, 749 F.2d 1451, 1456 (10th Cir. 1984).

19. *Dashnaw v. Peña*, 12 F.3d 1112, 1116 (D.C. Cir. 1994) (highlighting a lack of case law and other authority to the contrary of its decision). The differences between the ADA and the ADEA are inconsequential for purposes of this Comment because the ADEA also includes a remedial scheme similar to Title VII. *See* 29 U.S.C. § 216(b) (2006).

20. *See supra* notes 17–19 and accompanying text.

the circuit courts. Then, this Comment draws analogies from other circuit case law addressing equitable awards, such as prejudgment interest, as well as from the Supreme Court's elucidation of Title VII's purpose and application. Next, this Comment argues that the statutory language, congressional intent, and subsequent interpretation by the Supreme Court makes clear that Title VII's remedial scheme can include gross-up awards for negative tax consequences as a means, where appropriate, to make a victim "whole." Finally, this Comment synthesizes the various district court approaches and offers an approach to guide practitioners in calculating gross-up awards.

I. THE BROAD LANGUAGE OF TITLE VII AND THE NEED FOR INTERPRETATION

A. Title VII's Inception and Evolution

1. The Civil Rights Act of 1964

After World War II, there was increasing pressure in American politics for civil rights and equality for minorities, particularly for African Americans.²¹ Responding to the increased pressure, President John F. Kennedy charged the Justice Department in June 1963 with drafting legislation designed to eradicate or remedy such discrimination.²² On July 2, 1964, President Lyndon B. Johnson signed the 1964 CRA into law.²³

Title VII of the 1964 CRA prohibits discrimination by employers "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."²⁴ It also established the Equal Employment Opportunity Commission (EEOC) and charged the EEOC with enforcing the provisions of Title VII.²⁵ The 1964 CRA's primary purpose, and thus the EEOC's primary task, is to eliminate and remedy employment discrimination through intervention on behalf of the aggrieved employee.²⁶

Title VII, however, also allows victims of discrimination to bring civil actions.²⁷ Although Congress sought to give victims broad remedies by allowing civil actions, much confusion and uncertainty has developed.²⁸ Now

21. See CongressLink, Major Features of the Civil Rights Act of 1964, http://www.congresslink.org/print_basics_histmats_civilrights64text.htm#politics (last visited July 27, 2010) (describing the historical prologue to the 1964 CRA).

22. *Id.*

23. *Id.*

24. 42 U.S.C. § 2000e-2(a)(1) (2006).

25. *Id.* § 2000e-4.

26. See *id.* § 2000e-5; see also H.R. REP. NO. 102-40, pt. 1, at 64–65 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 602–03 (explaining the remedial scheme for gender and religious discrimination).

27. 42 U.S.C. § 2000e-5(f)(1).

28. Compare *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418–19 (1975) (discussing the broad equitable reach of discrimination statutes), with *Dewey v. Reynolds Metals Co.*, 429 F.2d

codified at 42 U.S.C. § 2000e-5(g),²⁹ the equitable-relief provision of the 1964 CRA represents the full breadth of congressional power in providing appropriate remedies to discrimination plaintiffs.³⁰ Section 2000e-5(g) allows federal and state courts applying the 1964 CRA to order injunctions, backpay awards, employment reinstatement, and, most notably, “any other equitable relief as the court deems appropriate.”³¹ The legislative history indicates that Congress meant to give the courts free reign in fashioning equitable remedies under Title VII.³²

2. *The Supreme Court's Interpretation of the Civil Rights Act of 1964's Remedial Scope*

In reviewing awards granted under Title VII of the 1964 CRA, the Supreme Court gave considerable breadth to the equitable remedies courts could impose in their judgments.³³ Perhaps the most frequently cited case according deference to a district court's equitable judgment is *Albemarle Paper Co. v. Moody*, which described the purpose of Title VII's remedies as “eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.”³⁴ Additionally, the Court was quick to

324, 336 (6th Cir. 1970) (holding that the discharge of an employee who refused to work on the Sabbath was warranted), *aff'd*, 392 U.S. 689, 689 (1971) (per curiam).

29. 42 U.S.C. § 2000e-5(g).

30. *See, e.g.*, 110 CONG. REC. 6549 (1964) (statement of Sen. Humphrey) (outlining the equitable relief available to plaintiffs who bring a successful Title VII claim).

31. 42 U.S.C. § 2000e-5(g)(1).

32. *See, e.g.*, 118 CONG. REC. 7168 (1972) (statement of Sen. Williams) (discussing Title VII during floor debate of the Equal Opportunity Employment Act of 1972). Senator Harrison Williams stated that the appropriate relief provision of Title VII was “intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible.” *Id.* The framers of Title VII stated that they were using the National Labor Relations Act (NLRA) provision authorizing “appropriate affirmative relief” as a model in crafting the remedies available under Title VII. *See* 110 CONG. REC. 6549 (1964) (statement of Sen. Humphrey); *id.* at 7214 (memorandum of Sens. Clark and Case). Under the NLRA, “[m]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941). Moreover, the Supreme Court stated in *Phelps Dodge* that “in applying its authority over backpay orders, the [National Labor Relations] Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations.” *Id.* at 198.

33. *See, e.g.*, *Franks v. Bowman Trans. Co.*, 424 U.S. 747, 779–80 (1976) (holding that the 1964 CRA's discretionary equitable remedies permitted a court to award seniority rights to plaintiff). *Franks v. Bowman Transportation Co.* illustrates the flexibility of Title VII's equitable remedies, as courts may grant any relief within their “sound equitable discretion.” *Id.* at 769–70.

34. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1973). In *Albemarle*, African American plaintiffs alleged discrimination based on company tests for seniority rights. *Id.* at 409. In a seven-to-one decision, the Court determined that there is a rebuttable presumption that successful plaintiffs in Title VII discrimination cases should receive backpay awards. *Id.* at 422.

recognize the nature of civil rights litigation and its economic effects on monetary awards.³⁵ Thus, in the 1980s, the Supreme Court began approving equitable measures taken by the lower courts to adjust monetary values of awards.³⁶

Albemarle was important in another respect as well; it made backpay awards the rule, not the exception.³⁷ Because backpay was so fundamental to Title VII's make-whole scheme, the Court stated that, "given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate [Title VII's] central statutory purposes."³⁸ In other instances, the Court did not give a liberal construction, which many believed to be at the heart of congressional intent, to Title VII.³⁹ In the late 1970s and throughout the 1980s, the Supreme Court limited its interpretation of the power of courts to enforce Title VII in equity.⁴⁰ Congress, recognizing the implications of judicial constraint, was forced to prove its intentions once more.⁴¹

3. *A Continuing Legacy: The Civil Rights Act of 1991, the Age Discrimination in Employment Act, and the Americans with Disabilities Act*

Displeased with the apparent conservatism of the Court's interpretation of discrimination statutes,⁴² Congress recognized that Title VII's remedial scheme needed to expand to include monetary damages not contemplated under the original Title VII.⁴³ In February 1990, Senator Ted Kennedy and Representative Augustus Hawkins led the vanguard for civil rights reform by

35. *Id.* at 415–17.

36. *See, e.g.,* *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989) (recognizing an adjustment in attorneys' fees to compensate for delay in payment); *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 483 U.S. 711, 716 (1987) (recognizing that courts generally compensate delays in payments by adjusting awards accordingly).

37. *Albemarle*, 422 U.S. at 421–22.

38. *Id.* at 421; *see* *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 719 (1978) (applying the *Albemarle* presumption of backpay).

39. The Supreme Court was narrowly reading several civil rights statutes to uphold partially discriminatory practices. *See, e.g.,* *Grove City Coll. v. Bell*, 465 U.S. 555, 573–75 (1984) (holding that a federal sex-discrimination statute applied only to the college's receipt of federal funds for its financial aid program, so its refusal to execute a school-wide compliance statement did not warrant revocation of financial aid where discrimination in that specific program was not shown).

40. *Compare* *Grove City Coll.*, 465 U.S. at 573–75, *with* *Albemarle*, 422 U.S. at 421.

41. *See* *infra* Part I.A.3 (discussing the legislative history of Title VII).

42. H.R. REP. NO. 102-40, pt. 1, at 60–66 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 598–604 (noting Congress's displeasure over recent Supreme Court decisions on discrimination and the need to expand the scope of civil rights statutes and remedies).

43. *See, e.g., id.* at 64–65 ("Monetary damages also are necessary to make discrimination victims whole for the terrible injury to their careers, to their mental and emotional health, and to their self-respect and dignity.").

introducing Senate Bill 2104 and House Bill 4000, respectively.⁴⁴ The stated purpose of the bills was “to strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.”⁴⁵ Although largely similar to the later-enacted Civil Rights Act of 1991, the argument against the 1990 bill was mainly over the employer “disparate-impact” provision,⁴⁶ which critics argued would ultimately lead employers to establish racial quotas in their hiring.⁴⁷

President George H. W. Bush indicated his intent to veto the initial version of the bill.⁴⁸ However, after lawmakers struck a compromise the following year, he signed the 1991 Civil Rights Act (1991 CRA).⁴⁹ This expansion of damages incorporated into the 1991 CRA⁵⁰ indicates that Congress sought to increase the means by which courts could make victims of discrimination whole.⁵¹

44. See PERRITT, *supra* note 16, § 1.02.

45. S. 2104, 101st Cong. § 2 (1990); H.R. 4000, 101st Cong. § 2 (1990).

46. S. 2104 § 4; H.R. 4000 § 4.

47. PERRITT, *supra* note 16, § 1.02; see GEORGE BUSH, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING ALTERNATIVE LANGUAGE TO S. 2104 AS PASSED BY THE CONGRESS, H.R. DOC. NO. 101-251, at 1 (1990) (conveying the President’s concern that the bill would lead to employment quotas based on population statistics).

48. See H.R. DOC. NO. 101-251, at 1.

49. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.); see also PERRITT, *supra* note 16, § 1.02. During floor debate for the amended version of the 1991 CRA, both Democratic and Republican leaders introduced material in an attempt to add their own party’s interpretation for the legislative record. Compare 137 CONG. REC. 30,661 (1991) (statement of Rep. Edwards) (offering an interpretative memorandum for the record), with *id.* at 30,677–68 (statement of Rep. Hyde) (submitting legislative history for the record), and *id.* at 29,014–15 (statement of Sen. Dole) (speculating that there would be future debates about the meaning of the provision).

50. See Civil Rights Act of 1991 § 2(1), 105 Stat. at 1071 (stating the congressional finding that “additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace”); see also PERRITT, *supra* note 16, §§ 1.01–.02 (discussing compensatory and punitive damages additions to Title VII remedies under the 1991 CRA).

51. See 29 U.S.C. § 626(c)(1) (2006) (“Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.”); see also CHARLES A. SULLIVAN & LAUREN M. WALTER, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE § 13.09[C] (4th ed. 2009) (explaining that when the ADEA was originally enacted, it adopted a remedial scheme similar to Title VII). The 1991 CRA sought to “further align the ADEA with Title VII, which was one of the purposes underlying the [1991 CRA].” *Id.* This is consistent with the broad associations made by courts when discussing discrimination statutes. Cf. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (discussing the make-whole purpose of discrimination statutes generally); Eshelman v. Agere Sys., Inc. (*Eshelman II*), 554 F.3d 426, 442 (3d Cir. 2009) (“Our conclusion is driven by the ‘make whole’ remedial purpose of the antidiscrimination statutes.”); Dashnaw v. Peña, 12 F.3d 1112, 1116 (D.C. Cir. 1994) (noting “the general rule that victims of discrimination should be made whole”).

The 1991 CRA was not the only reform of discrimination legislation enacted during the Bush administration. In 1990, the ADA was signed into law “[t]o establish a clear and comprehensive prohibition of discrimination on the basis of disability.”⁵² The ADA, rather than enacting its own remedial structure, adopted outright the remedies utilized by the 1964 CRA.⁵³ In 1991, Congress amended the ADA to allow for compensatory and punitive damages in limited circumstances.⁵⁴ Thus, claimants under the ADA face the same challenges as civil rights claimants in securing certain forms of equitable relief.⁵⁵

4. *Backpay and Prejudgment Interest Awards: Salary and Then Some*

In *Albemarle Paper Co. v. Moody*, the Supreme Court established a presumption of backpay when a plaintiff proves discrimination.⁵⁶ For many plaintiffs, backpay encompasses far more than just their previous salaries, and can include expected tips, lost bonuses, and overtime pay.⁵⁷ In short, backpay compensation includes “all economic benefits that the plaintiff would have received from the employer, whether directly or indirectly, but for the employer’s discriminatory conduct.”⁵⁸ Consequently, courts are faced with the complex task of calculating the total economic benefits a plaintiff-employee would be entitled to had the discrimination never occurred.⁵⁹ Generally, there are four steps in calculating appropriate backpay in Title VII cases: (1) determining the plaintiff’s probable employment history absent discrimination; (2) fixing the period of time where backpay should apply; (3) determining additional pecuniary interests other than lost salary or wages and the amounts

52. Americans with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2006 & Supp. II 2008)).

53. 42 U.S.C. § 12117.

54. See Civil Rights Act of 1990 § 102(a)(2), 105 Stat. at 1072 (codified at 42 U.S.C. § 1981a(a)(2)) (providing compensatory and punitive damages under the ADA when an employer engages in unlawful intentional discrimination); see also PERRITT, *supra* note 16, § 1.05[D]. If an employer can show that it tried to make reasonable accommodations to disabled employees, it may not be liable for compensatory or punitive damages under the ADA amendments. 42 U.S.C. § 12113; see PERRITT, *supra* note 16, § 1.05[D].

55. See Caprice L. Roberts, *Ratios, (Ir)Rationality and Civil Rights Punitive Awards*, 39 AKRON L. REV. 1019, 1026 (2006) (discussing obstacles facing civil rights plaintiffs for both proof and remedies).

56. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

57. See SULLIVAN & WALTER, *supra* note 51, § 13.09[B][4].

58. *Id.*; see *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1562 (11th Cir. 1986).

59. See, e.g., *Pappas v. Watson Wyatt & Co.*, No. 3:04CV304, 2008 WL 45385, at *12–13 (D. Conn. Jan. 2, 2008) (denying a tax gross-up on a complex calculation of COBRA payments); *EEOC v. Joe’s Stone Crab, Inc.*, 15 F. Supp. 2d 1364, 1372 & n.10 (S.D. Fla. 1998) (noting that backpay would include lost tips and bonuses calculable by averaging the performances of other employees).

of such interests; and (4) reducing the award when the plaintiff fails to mitigate the damage or other factors require the award to be reduced.⁶⁰

Often, a “fifth step”⁶¹ in calculating an equitable backpay award is determining prejudgment interest, the interest accruing on a backpay award.⁶² In at least one circuit, courts calculate prejudgment interest on backpay awards incrementally as it accrues rather than on the final lump sum.⁶³ Courts employ various interest-rate tables to calculate the appropriate interest awards in different cases.⁶⁴ As a result, the calculations are often complex and require submissions from economic experts.⁶⁵

The language of Title VII does not mention prejudgment interest, leaving it to the courts to determine if the awards fit into the statute’s “make-whole” scheme. Despite this discretion, courts have almost unanimously agreed that Title VII permits awards of prejudgment interest.⁶⁶ The Supreme Court, noting

60. SULLIVAN & WALTER, *supra* note 51, § 13.09[B][1]. It is important to note that Title VII specifically requires that courts reduce awards based on “[i]nterim earnings or amounts earnable with reasonable diligence.” 42 U.S.C. § 2000e-5(g)(1) (2006). Thus, if plaintiffs work to mitigate backpay damages as the statute directs, they will be taxed for wages earned during years actually worked at one effective rate, but taxed on the lump-sum backpay award at a different, usually higher, rate. *See infra* notes 217–22.

61. *See* Anthony E. Rothschild, Comment, *Prejudgment Interest: Survey and Suggestion*, 77 NW. U. L. REV. 192, 192–93 (1982). While these awards are commonplace and thus constitute a “fifth step” of a backpay award calculation, prejudgment interest itself is truly a separate award.

62. *See* H.R. REP. NO. 102-40, pt. 1, at 85 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 623. The House of Representatives Committee on Education and Labor found that, as a general rule, successful plaintiffs in civil actions who receive monetary relief—back pay as well as attorneys’ fees—are entitled to prejudgment interest on such relief to compensate recipients for the delay in payment. The principle is a simple one: money received later is worth less than money received now.

Id.

63. *Reed v. Mineta*, 438 F.3d 1063, 1067 (10th Cir. 2006); *see* SULLIVAN & WALTER, *supra* note 51, § 13.11.

64. *See, e.g.*, *Taxman v. Bd. of Educ.*, 91 F.3d 1547, 1566 (3d Cir. 1996) (using IRS-adjusted prime rate); *Gelof v. Papineau*, 829 F.2d 452, 456 (3d Cir. 1987) (using state-judgment rate); *Conway v. Electro Switch Corp.*, 825 F.2d 593, 602 (1st Cir. 1987) (using federal judgment rate to calculate prejudgment interest). *But see* *United States v. City of Warren*, 138 F.3d 1083, 1096 (6th Cir. 1998) (“[M]erely adjusting the dollars the plaintiff would have earned to compensate for diminished earning power because of inflation does not compensate for the lost use of the money in the intervening time.”).

65. *See, e.g.*, Plaintiff’s Motion to Mold Verdict to Include Prejudgment Interest & Damages Resulting from Tax Consequences at Ex. A, *Eshelman v. Agere Sys., Inc.*, No. Civ. A. 03-CV-1814 (E.D. Pa. Aug. 18, 2005) (including an affidavit from the plaintiff’s forensic economic expert calculating the prejudgment interest of the plaintiff’s damages award).

66. *See* *Green v. USX Corp.*, 843 F.2d 1511, 1530 (3d Cir. 1988); *Conway*, 825 F.2d at 602; *United States v. Gregory*, 818 F.2d 1114, 1118 (4th Cir. 1987); *Nagy v. U.S. Postal Serv.*, 773 F.2d 1190 (11th Cir. 1985); *Parson v. Kaiser Aluminum & Chem. Corp.*, 727 F.2d 473, 478 (5th Cir. 1984); *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1446 (9th Cir. 1984), *remanded and modified on other grounds*, 742 F.2d 520 (1984); *EEOC v. Wooster Brush Co. Employees Relief Ass’n*, 727 F.2d 566, 578–79 (6th Cir. 1984); *Washington v. Kroger Co.*, 671 F.2d 1072, 1078 (8th Cir. 1982); *Taylor v. Philips Indus., Inc.*, 593 F.2d 783, 787 (7th Cir. 1979).

this agreement, later affirmed “that Title VII authorizes prejudgment interest as part of the backpay remedy in suits against private employers.”⁶⁷ However, after the Supreme Court held that prejudgment interest was not specifically authorized against governmental entities,⁶⁸ Congress amended Title VII to waive sovereign immunity.⁶⁹ This short history of the prejudgment interest award shows how judicial interpretation may define the manifestations of Congress’s make-whole intent under Title VII.⁷⁰

B. The Tax Man Cometh: Discrimination Awards and the Internal Revenue Code

Damages awards in discrimination cases have received oscillating treatment under the Internal Revenue Code (I.R.C.).⁷¹ At times, the Internal Revenue Service (IRS) exempted punitive damages from gross-income calculations.⁷² Congress then changed direction and taxed punitive damages.⁷³ Although the I.R.C. exempts from taxation damages awards for personal physical injuries,⁷⁴ whether as a lump sum or periodic payments, it does not exclude most damages awards for discrimination.⁷⁵ The Supreme Court and Congress have repeatedly reaffirmed this view.⁷⁶ Even contingent attorneys’ fees awards are

67. *Loeffler v. Frank*, 486 U.S. 549, 557 (1988). The Court went on to state that “[p]rejudgment interest, of course, is ‘an element of complete compensation.’” *Id.* at 558 (quoting *West Virginia v. United States*, 479 U.S. 305, 310 (1987)); see *Rothschild*, *supra* note 61, at 195–99 (discussing early attitudes toward prejudgment interest awards). It is important to realize that the Supreme Court’s holding in *Loeffler* explicitly applies to claims brought against private employers. See *infra* Part III.A (discussing Title VII remedies against government employers without an explicit waiver of sovereign immunity).

68. See *Library of Cong. v. Shaw*, 478 U.S. 310, 319 (1986), *abrogated in part by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

69. 42 U.S.C. § 2000e-16(d) (2006) (“The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.”).

70. *Loeffler*, 486 U.S. at 558.

71. See *Foster v. United States*, 249 F.3d 1275, 1278–81 (11th Cir. 2001) (discussing cases where courts have exempted, and then allowed, gross-income calculations on punitive damages awards), *overruled on other grounds by* *Comm’r v. Banks*, 543 U.S. 426, 429–39 (2005).

72. See Rev. Rul. 75-45, 1975-1 C.B. 47 (exempting punitive damages under I.R.C. § 104(a)(2) from gross income).

73. Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1605, 110 Stat. 1755, 1838 (codified as amended at I.R.C. § 104(a)(2) (2006)) (adding a “physical” requirement and punitive-damages provision to I.R.C. § 104(a)(2)).

74. I.R.C. § 104(a)(2).

75. See Rev. Rul. 96-65, 1996-2 C.B. 6-7; *United States v. Burke*, 504 U.S. 229, 242 (1992), *modified on other grounds by* § 1605, 110 Stat. at 1838.

76. See *Comm’r v. Schleier*, 515 U.S. 323, 336–37 (1995), *modified on other grounds by* § 1605, 110 Stat. at 1838; *Burke*, 504 U.S. at 242. In *Burke*, the Court decided the taxability issue under the 1964 CRA and, focusing on the nature of the remedies in Title VII, concluded that those remedies did not besit a “tort-like ‘personal injury’” for purposes of § 104(a)(2) exclusion.

generally taxable as income to prevailing plaintiffs in discrimination suits.⁷⁷

Not surprisingly, the tax consequences of large backpay awards can be particularly harsh on plaintiffs.⁷⁸ The current ruling of the IRS is that backpay awards received under Title VII are not excludable from gross income and are considered “wages” or “compensation” under various applicable tax statutes.⁷⁹ The result is that lump-sum backpay awards constitute “income” and “wages” in the year in which the award is paid,⁸⁰ therefore, such awards are taxable at that time.⁸¹ In prolonged litigation, an award for several years of backpay could increase the plaintiff’s tax liability by thousands of dollars.⁸² Moreover, provisions in the I.R.C. allowing for income-averaging, which permit plaintiffs

Burke, 504 U.S. at 238. However, the Court based its conclusion on the fact that Title VII remedies did not include compensatory or punitive damages, which it viewed as vital for tort-type damages to be excludable under § 104. *Id.* at 238–39. Although the 1991 CRA made punitive and compensatory damages available as Title VII remedies, *see* PERRITT, *supra* note 16, § 1.02, Congress amended § 104(a)(2) to require “physical” injury or sickness in order to be excluded. § 1605(a), 110 Stat. at 1838. Thus, whatever the state of the law between 1991 and 1996, it is clear that Congress does not currently wish to exclude backpay awards from taxation.

77. *Comm’r v. Banks*, 543 U.S. 426, 430 (2005) (“We hold that, as a general rule, when a litigant’s recovery constitutes income, the litigant’s income includes the portion of the recovery paid to the attorney as a contingent fee.”). *But see* I.R.C. § 62(a)(20) (allowing for above-the-line deductions of attorneys’ fees awarded in discrimination suits).

78. *See, e.g., Eshelman v. Agere Sys. Inc. (Eshelman II)*, 554 F.3d 426, 441–42 (3d Cir. 2009) (noting that lump-sum backpay would increase a plaintiff’s tax liability by several thousand dollars); *see also* discussion *infra* Part III.C.

79. Rev. Rul. 96-65, 1996-2 C.B. 6 (interpreting Title VII as applied to the ADA). Backpay awards under Title VII are “wages” under numerous statutory provisions. *See* I.R.C. §§ 3121(a), 3306(b), 3401(a). In other contexts, the IRS seems equally ready to classify such awards as “compensation.” Rev. Rul. 96-65, 1996-2 C.B. 6 (citing I.R.C. § 3306). The IRS reasons that such awards are “completely independent of” personal physical injuries or physical sickness, and such awards are thus not “damages received on account of” these injuries. *Id.*; *see* I.R.C. § 104(a)(2); *Hukkanen-Campbell v. Comm’r*, 79 T.C.M. (CCH) 2122, 2125 (2000).

80. *See Tanaka v. Dep’t of Navy*, 788 F.2d 1552, 1553 (D.C. Cir. 1986) (*per curiam*); Rev. Rul. 78-336, 1978-2 C.B. 255; *see also* *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 204 (2001) (holding that backpay is taxable in the year paid for certain purposes). However, backpay awards are treated as wages for the years in which the wages should have been paid with regards to social-security benefits treatment. *Tanaka*, 788 F.2d at 1553.

81. *Cleveland Indians*, 532 U.S. at 204. It is important to note that Congress has consistently failed to enact legislation introduced to offset or eliminate the negative tax consequences of lump-sum backpay awards under Title VII and similar statutes. *See infra* note 202 and accompanying text (discussing the Civil Rights Tax Relief Act (CRTRA)). The effect of congressional inaction can be particularly devastating when treasury regulations address a statute. The Court has noted that “‘Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law.’” *Cleveland Indians*, 532 U.S. at 220 (quoting *Cottage Savings Ass’n v. Comm’r*, 499 U.S. 554, 561 (1991)). Thus, in the absence of congressional action, courts are forced to create equitable remedies that do not impinge upon the myriad of tax regulations surrounding discrimination awards.

82. *See, e.g., Eshelman II*, 554 F.3d at 441; *Sears v. Atchison, Topeka & Santa Fe Ry. (Sears II)*, 749 F.2d 1451, 1456 (10th Cir. 1984); *Loesch v. City of Phila.*, No. 05-cv-0578, 2008 WL 2557429, at *11 (E.D. Pa. June 19, 2008).

to spread lump-sum awards out over several taxable years, provide little, if any, relief.⁸³ Thus, courts are left with the responsibility of creating equitable alternatives, because Congress has not passed legislation to alleviate the problem.⁸⁴

C. The Circuit Courts Address the Issue

1. The Tenth Circuit's Recognition of Gross-Ups

In *Sears v. Atchison, Topeka & Santa Fe Railway*, Joe Sears filed a discrimination claim under the 1964 CRA against the Atchison, Topeka, & Santa Fe Railway Company and what would later become the United Transportation Union.⁸⁵ His suit, a class action filed on behalf of train porters, alleged that a segregated job structure existed between predominantly white brakemen and African American porters, in violation of Title VII.⁸⁶ The district court held for the class.⁸⁷ After the Tenth Circuit remanded the case for the district court to fashion a remedy for the entire class, the district court ordered seniority and backpay relief, attorneys' fees, and a composite tax gross-up.⁸⁸ The defendants appealed and contested the gross-up, but the Tenth Circuit held that Title VII authorized the award in limited circumstances.⁸⁹ The court found that this class met those limited circumstances due to the protracted nature of the litigation.⁹⁰

In examining the propriety of the district court's gross-up award, the Tenth Circuit first noted that the award covered seventeen years of backpay.⁹¹ Additionally, the court reasoned that the amounts involved "will likely place the living members of the class in the highest income tax bracket."⁹² Thus, while a provision existed in the I.R.C. allowing discrimination plaintiffs to

83. See *Sears II*, 749 F.2d at 1456 (noting that even if plaintiffs in a class-action suit income-averaged their awards, they would still be in the highest tax bracket); see also *infra* note 202.

84. See *supra* note 81 (addressing congressional inaction and IRS regulations).

85. *Sears II*, 749 F.2d at 1453. Sears initially filed his complaint with the EEOC, as required by statute, and initiated his civil suit in district court upon obtaining a right-to-sue letter from the EEOC. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*; *Sears v. Atchison, Topeka & Santa Fe Ry. (Sears I)*, No. W-4963, 1982 WL 500, at *4-8 (D. Kan. Dec. 1, 1982). The Tenth Circuit described the award as "composite" because several members of the class had predeceased the decision, so income and estate taxes had to be considered. *Sears II*, 749 F.2d at 1456.

89. *Sears II*, 749 F.2d at 1456.

90. *Id.* Specifically, the court found that the plaintiffs were entitled to a "tax component" as part of their backpay awards to offset the tax liability that necessarily comes with receiving a lump sum comprised of seventeen years of backpay. *Id.*

91. *Id.*

92. *Id.*

average their income,⁹³ the court found that the provision would provide insufficient relief for the plaintiffs due to the sheer size of their sums.⁹⁴

Moreover, the fact that many class members were deceased supported the district court's tax gross-up.⁹⁵ Unlike the tax provision allowing for income-averaging, no such provision existed for the deceased taxpayers' estates.⁹⁶ Because nearly forty percent of the class members had died prior to the decision, the Tenth Circuit held that awarding the class an amount to offset its substantial negative tax liability was "an appropriate exercise of [the district court's] discretion."⁹⁷ The court did note, however, that such awards "may not be appropriate in a typical Title VII case."⁹⁸ Thus, whether courts in the Tenth Circuit award tax gross-ups depends on whether the facts in the case warrant such a remedy.

2. *The District of Columbia Circuit: Setting Precedent?*

In 1982, Francis Dashnaw retired from his position at the Federal Maritime Administration (MARAD), a division of the Department of Transportation, before judicial resolution of his age discrimination claim under the ADEA.⁹⁹ In 1986, he claimed that his retirement was forced upon him as a "constructive discharge" because MARAD repeatedly promoted younger candidates instead of him.¹⁰⁰ In 1992, nearly fifteen years after his initial complaint, the district court found that Dashnaw was indeed a victim of age discrimination under the ADEA and that he was constructively discharged from his position.¹⁰¹ The district court then ordered that Dashnaw be reinstated at an increased pay grade and that he receive backpay reflecting the promotions he was improperly denied.¹⁰² The government appealed the decision, arguing that the claims were

93. *Id.* (citing I.R.C. § 1302(c)(2) (1982) (repealed 1986)).

94. *See id.*

95. *Id.*

96. *Id.* (citing Treas. Reg. § 1.1303-1(a) (1983)). The present I.R.C. has no income-averaging provisions available for living taxpayers; therefore, if decided today, this case would presumably still reach the same conclusion for tax gross-up awards. However, scholars debate the effectiveness of income-averaging provisions in the I.R.C. Compare Lily L. Batchfelder, *Taxing the Poor: Income Averaging Reconsidered*, 40 HARV. J. ON LEGIS. 395, 404-06 (2003) (arguing that the poor benefit substantially more from income-averaging than the rich), with Robert Schmalbeck, *Income Averaging After Twenty Years: A Failed Experiment in Horizontal Equity*, 1984 DUKE L.J. 509, 578 (1984) (arguing that because income-averaging is unnecessary and actually benefits the wealthy, Congress should be applauded for curtailing its use).

97. *Sears II* at 1457.

98. *Id.* at 1456.

99. *Dashnaw v. Peña*, 12 F.3d 1112, 1113 (D.C. Cir. 1994) (per curiam).

100. *Id.* at 1113-14.

101. *Id.* at 1113-15.

102. *Id.* at 1114-15. Since the court determined that Dashnaw was constructively discharged, he was also awarded backpay for the years following his departure from MARAD. *Id.* at 1115.

untimely.¹⁰³ Dashnaw countered by filing cross-claims alleging, among other things, that the district court should have granted a tax gross-up award.¹⁰⁴

In deciding the case, the District of Columbia Circuit alluded to the similarities among the federal discrimination statutes.¹⁰⁵ Accordingly, the court's discussion of Dashnaw's tax claim did not specifically reference the ADEA's remedial scheme. Rather, the court broadly held, "Absent an arrangement by voluntary settlement of the parties, the general rule that victims of discrimination should be made whole does not support 'gross-ups' of backpay to cover tax liability. We know of no authority for such relief, and, appellee points to none."¹⁰⁶ Thus, the court was unwilling to extend the award to Dashnaw due to a lack of support.¹⁰⁷

In 2007, the District of Columbia Circuit was again presented with the issue of tax gross-ups in *Fogg v. Gonzales (Fogg IV)*.¹⁰⁸ Matthew Fogg was employed by the United States Marshal Service (USMS) and alleged discrimination based on race after being denied promotions, stripped of his duties, and eventually terminated.¹⁰⁹ At trial, a jury found that the USMS had discriminated against Fogg in violation of 1991 CRA and awarded Fogg, in part, backpay for the decade-long discrimination.¹¹⁰ On remand after subsequent appeal,¹¹¹ the district court awarded Fogg a tax gross-up on his backpay award, referencing the Tenth Circuit's decision in *Sears II*.¹¹² The District of Columbia Circuit, however, disallowed the award, citing its "binding circuit precedent" in *Dashnaw*.¹¹³

3. The Third Circuit and Eshelman

In 1981, Joan Eshelman began her career with what would eventually become Agere Systems, Inc.¹¹⁴ Eshelman distinguished herself at work¹¹⁵ and

103. *Id.*

104. *Id.* at 1116.

105. *See id.* at 1115 (treating the constructive discharge issue using Title VII analysis, in which constructive discharge yields recovery for the claimant) (citing *Clark v. Marsh*, 665 F.2d 1168, 1172 n.4 (D.C. Cir. 1981)).

106. *Id.* at 1116.

107. *Id.*

108. *Fogg v. Gonzales (Fogg IV)*, 492 F.3d 447, 455–56 (D.C. Cir. 2007).

109. *Id.* at 449–50. Specifically, Fogg alleged that twice he had been denied a performance evaluation necessary for his scheduled GS pay-grade increase, and that he had been reprimanded and effectively demoted. *Id.* at 450.

110. *Fogg v. Gonzalez (Fogg III)*, 407 F. Supp. 2d 79, 83 (D.D.C. 2005).

111. *Fogg v. Ashcroft (Fogg II)*, 254 F.3d 103, 111 (D.C. Cir. 2001), *aff'd in part and denied in part*, *Fogg IV*, 492 F.3d at 456.

112. *Fogg IV*, 492 F.3d at 456.

113. *Id.* (citing *Dashnaw v. Peña*, 12 F.3d 1112, 1116 (D.C. Cir. 1994)).

114. *Eshelman v. Agere Sys., Inc. (Eshelman II)*, 554 F.3d 426, 430 (3d Cir. 2009).

115. *Id.* at 431 (discussing Eshelman's excellent performance evaluations both before and during her illness).

received several promotions, culminating in her position as supervisor of the company's Chief Information Office in Pennsylvania.¹¹⁶ However, in 1998, Eshelman was diagnosed with breast cancer and took several months' leave from work, eventually returning on a part-time basis.¹¹⁷ Because of her chemo-therapy treatments, Eshelman suffered from short-term memory deficiencies and required accommodations.¹¹⁸ On December 30, 2001, Joan Eshelman was laid off, and she subsequently initiated a lawsuit under the ADA.¹¹⁹

At trial, the jury returned a verdict finding that Agere had discriminated against Eshelman on the basis of her disability and awarded her "\$170,000 in back pay and \$30,000 in compensatory damages."¹²⁰ On appeal, Agere argued, in part, that the district court erred in awarding Eshelman an additional tax gross-up on her backpay award.¹²¹ Specifically, Agere contended that "there [was] no statutory or case law that supports this aspect of the District Court's decision."¹²² The Third Circuit disagreed, and allowed the award.¹²³ The court noted, however, the disagreement between the Tenth and District of Columbia Circuits, and accordingly offered detailed support for its decision to allow backpay gross-ups for Title VII and ADA plaintiffs.¹²⁴

The Third Circuit began its analysis of gross-ups by examining the purpose of Title VII remedies.¹²⁵ The court cited Supreme Court decisions supporting its interpretation that the main purpose of Title VII "equitable" relief is to make victims whole.¹²⁶ The court also noted that Congress bestowed upon the district courts the full scope of congressional power to implement the make-whole purpose of Title VII.¹²⁷ According to the Third Circuit, reaching a just result requires courts to restore prevailing plaintiffs to an "economic status quo" as much as possible.¹²⁸

Determining that Title VII gives courts wide latitude in fashioning equitable relief, the Third Circuit next examined why tax gross-ups are necessary at

116. *Id.* at 430.

117. *Id.*

118. *Id.* at 430–31.

119. *Id.* at 432. Eshelman also attempted to assert an age discrimination claim under the ADEA, but was unsuccessful. *Id.*

120. *Id.*; see *infra* note 163 (discussing Seventh Amendment issues presented by additur to jury awards).

121. *Eshelman II*, 554 F.3d at 432–33.

122. *Id.* at 440; cf. *Dashnaw v. Peña*, 12 F.3d 1112, 1116 (D.C. Cir. 1994) ("We know of no authority for such relief, and appellee points to none. Given the complete lack of support in existing case law for tax gross-ups, we decline so to extend the law in this case.").

123. *Eshelman II*, 554 F.3d at 442–43.

124. *Id.* at 441–42.

125. *Id.* at 440.

126. *Id.* (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)).

127. *Id.*

128. *Id.* (quoting *In re Continental Airlines*, 125 F.3d 120, 135 (3d Cir 1997)).

all.¹²⁹ The court noted that backpay awards are taxable,¹³⁰ and that the taxes apply for the year the plaintiff receives the award.¹³¹ Faced with the question of whether a district court could grant equitable relief for the tax burden, the Third Circuit surveyed case law and held that tax gross-ups are within a district court's Title VII power. Accordingly, the Third Circuit now faced the question of whether a district court could grant equitable relief for the tax burden.¹³² The court based support for its decision largely on a comparison of tax gross-ups to prejudgment interest awards, concluding that both awards serve similar purposes.¹³³ Accordingly, because of the "now-universal acceptance" of prejudgment interest awards, courts should be able to award tax gross-ups in appropriate cases.¹³⁴

Nevertheless, the Third Circuit was quick to limit its holding, stating that its opinion "d[id] not suggest that a prevailing plaintiff in discrimination cases is presumptively entitled to an additional [tax gross-up]." ¹³⁵ Rather, courts should consider the propriety of tax gross-ups "in light of the circumstances peculiar to the case."¹³⁶ In *Eshelman v. Agere Systems, Inc. (Eshelman II)*, the court pointed to the undisputed affidavit submitted by Eshelman's economic expert calculating her tax consequences because of the lump-sum backpay award, as well as the past tax returns she filed for the years in question.¹³⁷ Accordingly, the Third Circuit held that, given the evidence, the district court did not abuse its discretion in awarding Eshelman an additional amount.¹³⁸

D. The Other Circuits: Are Tax Gross-Ups on the Horizon?

1. The Eighth Circuit: Suggestive Reasoning

Although no other circuit has squarely decided the issue, the Eighth Circuit previewed what may be on the horizon in *Hukkanen v. International Union of*

129. *Id.* at 441.

130. *Id.*

131. *Id.* ("[R]eceipt of a lump sum back pay award could lift an employee into a higher tax bracket for that year, meaning the employee would have a greater tax burden than if she were to have received that same pay in the normal course."); see *Robinson v. Se. Pa. Transp. Auth.*, 982 F.2d 892, 898 (3d Cir. 1993); see also *supra* Part I.B.

132. *Eshelman II*, 554 F.3d at 441–42.

133. *Id.* at 442. The court explained that tax gross-ups and prejudgment interest awards "represent[] the recognition that the harm to a prevailing plaintiff's pecuniary interest may be broader in scope than just a loss of back pay." *Id.*

134. *Id.* (citing *Loeffler v. Frank*, 486 U.S. 549, 557 (1988)).

135. *Id.* at 443.

136. *Id.* (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975)).

137. *Id.* at 442–43; Plaintiff's Motion to Mold Verdict to Include Prejudgment Interest & Damages Resulting from Tax Consequences, *supra* note 65, at Ex. A.

138. *Eshelman II*, 554 F.3d at 442–43. The district court, basing its award off Eshelman's expert, granted an additional \$6,893 to Eshelman. *Id.* The precise amount of the award is indicative of the specificity required by the district court, and upheld by the Third Circuit, as to calculable, unambiguous damages. *Id.* at 443.

Operating Engineers.¹³⁹ There, Nancy Hukkanen resigned from her position at the International Union of Operating Engineers after alleged lewd acts by her supervisor, including an armed threat of rape.¹⁴⁰ Hukkanen then brought an action under Title VII claiming constructive discharge due to gender discrimination.¹⁴¹ In reviewing the district court's denial of a tax gross-up under Title VII, the Eighth Circuit answered only whether denial of a gross-up was proper in that case, and avoided the question of whether such awards were generally authorized by Title VII.¹⁴² Below, the district court denied a tax gross-up for Hukkanen's backpay award because she had "failed to present evidence of the enhancement's amount or a convenient way for the court to calculate the amount at the time the court announced its judgment."¹⁴³ On appeal, the Eighth Circuit affirmed, holding only that the district court's denial was not an abuse of discretion based on the lack of appropriate evidence.¹⁴⁴ The Eighth Circuit's holding, then, suggests that if a district court has adequate proof of negative tax liability incurred because of a backpay award, the power to grant such an award would be within its discretion. The issue in *Hukkanen* was the plaintiff's factual showing, *not* the equitable remedy itself.

Four years after *Hukkanen*, the Eighth Circuit assessed the propriety of a tax gross-up awarded against the federal government in *Arneson v. Callahan*.¹⁴⁵ Stephen Arneson alleged wrongful discharge from his position at the Social Security Administration in violation of the Rehabilitation Act of 1973¹⁴⁶ because of a neurological disorder.¹⁴⁷ After Arneson prevailed at trial on his claim and received a backpay award, the district court awarded a tax gross-up on his backpay.¹⁴⁸ On appeal, the Eighth Circuit reversed the district court's award based on a sovereign immunity rationale, commenting that "[t]he mere fact that Congress intended that discrimination victims receive *a full measure of back pay* does not amount to an unequivocal and express waiver of sovereign immunity."¹⁴⁹ Seemingly recognizing that "a full measure of back pay" may include a tax gross-up, the Eighth Circuit went on to say that if tax gross-ups are authorized under Title VII, the awards are "analogous to the

139. *Hukkanen v. Int'l Union of Operating Eng'rs*, 3 F.3d 281, 284 (8th Cir. 1993).

140. *Id.* at 283–84.

141. *Id.* at 284.

142. *See id.* at 286.

143. *Id.* at 287.

144. *Id.* Hukkanen then tried, unsuccessfully, to exclude the award and deduct attorneys' fees from her income tax for the award year. *See Hukkanen-Campbell v. Comm'r*, 79 T.C.M. (CCH) 2122, 2126 (2000).

145. *Arneson v. Callahan*, 128 F.3d 1243, 1245–46 (8th Cir. 1997).

146. 29 U.S.C. §§ 701–796 (2006). Section 794a(a)(1) incorporates and adopts the remedies available under Title VII of the 1964 CRA. *Id.* § 794a(a)(1).

147. *Arneson*, 128 F.3d at 1244–45. Arneson suffered from apraxia, a condition that affected his ability to focus. *Id.* at 1245.

148. *Id.* at 1247.

149. *Id.* (emphasis added).

prejudgment interest remedy . . . as an element of making persons whole for discrimination injuries.”¹⁵⁰ Ultimately, because Congress had expressly authorized prejudgment interest awards against the government,¹⁵¹ the court concluded that a tax gross-up was not appropriate in this case because Congress had not expressly provided for it.¹⁵²

2. Other District Courts: Similarly Split

The issue of proof has been critical in district court decisions addressing tax gross-ups.¹⁵³ For example, in *O’Neill v. Sears, Roebuck & Co.*, the District Court for the Eastern District of Pennsylvania held that a plaintiff had adequately proven her negative tax liability for her backpay award and a tax gross-up was therefore proper.¹⁵⁴ After prevailing in the case and receiving frontpay, backpay, liquidated damages, and compensatory damages, the plaintiff argued for a tax gross-up for the entire award.¹⁵⁵ However, the district court held that only the backpay and frontpay awards merited tax gross-ups.¹⁵⁶ Nevertheless, because the court had precise figures before it—offered into evidence by the plaintiff—the court was able to calculate the exact amount of increased tax liability for the plaintiff and awarded that amount as a tax gross-up.¹⁵⁷ The district court reasoned that it was not about how much the employee *receives* from the backpay award because “[t]he goal . . . is to allow [the] plaintiff to *keep* the same amount of money as if he had not been unlawfully terminated.”¹⁵⁸ Therefore, tax gross-ups were appropriate.

In the sex-discrimination context, the District Court for the Southern District of Florida said in *EEOC v. Joe’s Stone Crab* that “a district court, in the exercise of its discretion, may include a tax component in a lump-sum back pay award to compensate prevailing Title VII plaintiffs.”¹⁵⁹ Like in *O’Neill*, the *Joe’s Stone Crab* court noted that tax gross-up awards were part of the prevailing practice in discrimination settlement agreements and within the power of the district courts to award.¹⁶⁰ However, the court held that the

150. *Id.* (citation omitted).

151. 42 U.S.C. § 2000e-16(d) (2006) (allowing for prejudgment interest awards against government defendants).

152. *Arneson*, 128 F.3d at 1247; see discussion *infra* Part III.A.1.

153. See *Argue v. David Davis Enters., Inc.*, No. 02-9521, 2009 WL 750197, at *26–27 (E.D. Pa. Mar. 20, 2009); *Loesch v. City of Phila.*, No. 05-cv-0578, 2008 WL 2557429, at *11 (E.D. Pa. June 19, 2008); *O’Neill v. Sears, Roebuck & Co.*, 108 F. Supp. 2d 443, 446 (E.D. Pa. 2000); *EEOC v. Joe’s Stone Crab, Inc.*, 15 F. Supp. 2d 1364, 1380 (S.D. Fla. 1998).

154. *O’Neill*, 108 F. Supp. 2d at 446.

155. *Id.*

156. *Id.*

157. *Id.* at 446, 448.

158. *Id.* at 447.

159. *EEOC v. Joe’s Stone Crab, Inc.*, 15 F. Supp. 2d 1364, 1380 (S.D. Fla. 1998).

160. *Id.*

EEOC failed to offer adequate evidence enabling the court to make an appropriate calculation, and it consequently declined to award tax gross-ups.¹⁶¹

This case arguably stands for the proposition that a tax gross-up award requires a level of proof of precise calculability similar to that implied by the Eighth Circuit.¹⁶² It appears that only two federal courts have held that tax gross-ups are beyond the equitable powers granted the judiciary under Title VII.¹⁶³

II. "ANY OTHER RELIEF": THE CIRCUITS' RESPONSE TO THE ADVERSE TAX CONSEQUENCES OF LUMP-SUM BACKPAY AWARDS

A. A Reasoned Approach: The Tenth and Third Circuits Find a Basis for Tax Gross-Ups

1. The Tenth Circuit Approach: Nothing Prevents Tax Gross-Ups

The Tenth Circuit squarely faced the issue of whether Title VII's remedial scope could include tax gross-ups in *Sears v. Atchison, Topeka & Santa Fe Railway (Sears II)*, and held that such awards were indeed authorized by the

161. *Id.*

162. *Compare id.* ("[T]he EEOC failed to provide sufficient competent foundation evidence to permit the court to make these calculations."), with *Hukkanen v. Int'l Union of Operating Eng'rs*, 3 F.3d 281, 287 (8th Cir. 1993) (noting that the plaintiff had "failed to produce evidence of the enhancement's amount or a convenient way for the court to calculate the amount at the time the court announced its judgment"). For a discussion of proof and calculation issues, see *infra* Part III.C (discussing proof and calculation issues).

163. *See Dashnaw v. Peña*, 12 F.3d 1112, 1116 (D.C. Cir. 1994); *Best v. Shell Oil Co.*, 4 F. Supp. 2d 770, 776 (N.D. Ill. 1998). The discussion in *Best v. Shell Oil Co.* is even sparser than *Dashnaw*—perhaps because it cites *Dashnaw* as authority. *Best*, 4 F. Supp. 2d at 776. The *Best* court simply stated, "The case authorities support Shell's objection." *Id.*

Another district court case denied a tax gross-up not on Title VII grounds, but on constitutional grounds. *Kelley v. City of Albuquerque*, No. CIV 03-507, 2006 WL 1304954, at *1, *6 (D.N.M. Mar. 31, 2006) (denying the award because of the Seventh Amendment's prohibition against additur in federal cases); *see* U.S. CONST. amend. VII. An exception to this constitutional prohibition exists, however, "where the jury has found the underlying liability and there is no genuine issue as to the correct amount of damages." *EEOC v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1252 (11th Cir. 1997); *cf. Decato v. Travelers Ins. Co.*, 379 F.2d 796, 799 (1st Cir. 1967) ("Just because a party chooses to litigate does not necessarily mean that there is a dispute as to damages.").

Courts deciding tax gross-ups usually do not address the Seventh Amendment's additur prohibition, perhaps because similar claims against interest awards on verdicts have failed. *See, e.g., Stentor Elec. Mfg. Co. v. Klaxon Co.*, 125 F.2d 820, 826 (3d Cir. 1942) (holding that augmenting a jury verdict to include an additional amount awarded as interest did not violate the additur prohibition when the award was authorized by statute, regardless of whether the jury was so instructed). Following this logic, it is arguable that because a court finds that interest awards and tax gross-ups are authorized under Title VII, disputes over calculations do not warrant a new jury trial where liability has been found and backpay already awarded.

statute.¹⁶⁴ In *Sears II*, the court based its reasoning, at least in part, on the broad interpretation that the Supreme Court gave to Title VII remedies.¹⁶⁵ Regrettably, the Tenth Circuit did not elucidate its reasoning beyond citing these Supreme Court decisions.¹⁶⁶ In upholding the tax gross-up award, the court was quick to note that such tax awards may not be appropriate in ordinary Title VII cases, which suggests that the particular adverse tax consequences facing these plaintiffs made the award appropriate in this case.¹⁶⁷ Therefore, plaintiffs in the Tenth Circuit should offer evidence of the propriety of tax gross-ups given their particular circumstances,¹⁶⁸ as well as evidence of the calculated amount of such awards.¹⁶⁹

2. *The Third Circuit: Look at Everything, Then Decide*

In 2009, the Third Circuit in *Eshelman v. Agere Systems, Inc. (Eshelman II)* joined the Tenth Circuit's holding in *Sears II* that tax gross-ups were available to prevailing Title VII plaintiffs.¹⁷⁰ The Third Circuit had previously noted in an en banc decision that, in fashioning a remedy under Title VII, a court should create an award that "most closely approximates the conditions that would have prevailed in the absence of discrimination."¹⁷¹ In *Eshelman II*, the court extended this principle and authorized tax gross-ups for backpay awards in discrimination cases.¹⁷²

The Third Circuit went into much greater detail on the propriety of tax gross-ups than did the Tenth Circuit.¹⁷³ The Third Circuit recognized that "the

164. *Sears v. Atchison, Topeka & Santa Fe Ry. (Sears II)*, 749 F.2d 1451, 1456 (10th Cir. 1984).

165. *See id.* (citing *Ford Motor Co. v. EEOC*, 458 U.S. 219, 230 (1982); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 364 (1977)).

166. *See id.* The court did not, for example, cite other equitable remedies granted by courts in discrimination cases, such as prejudgment interest awards. *Compare Eshelman v. Agere Sys., Inc. (Eshelman II)*, 554 F.3d 426, 442 (3d Cir. 2009), and *Arneson v. Callahan*, 128 F.3d 1243, 1247 (8th Cir. 1997), with *Sears II*, 749 F.2d at 1456. Rather, the court's somewhat cursory discussion of the remedial powers granted to courts under Title VII leaves courts expansive powers to fashion creative awards as they find appropriate. *Id.*

167. *Sears II*, 749 F.2d at 1456. The "protracted nature of the litigation" led to a backpay award so large that much of it would be taxed in the highest tax bracket. *Id.* Further, the court noted that the tax provisions in existence at the time would only allow the plaintiffs to average their awarded income over three years, and in the case of deceased plaintiffs, the estate tax in existence did not provide for income-averaging; therefore, the tax gross-up award was warranted. *Id.*

168. *See id.*

169. *See discussion infra* Part III.C (addressing appropriate evidence and calculations for tax gross-ups).

170. *Eshelman II*, 554 F.3d at 441–42.

171. *Taxman v. Bd. of Educ.*, 91 F.3d 1547, 1565–66 (3d Cir. 1996) (en banc).

172. *Eshelman II*, 554 F.3d at 441–42.

173. *Compare id.* at 442 (discussing other types of equitable remedies adopted by courts in Title VII awards), with *Sears v. Atchison, Topeka & Santa Fe Ry. (Sears II)*, 749 F.2d 1451, 1456

harm to a prevailing employee's pecuniary interest may be broader in scope than just a loss of back pay."¹⁷⁴ The district courts, according to this approach, have the broad authority under Title VII to fashion a remedy "to achieve complete restoration of the prevailing employee's economic status quo."¹⁷⁵ The Third Circuit pointed to the Supreme Court's acquiescence to prejudgment interest awards as evidence that other monetary awards may be necessary to accomplish the make-whole scheme of Title VII's remedies.¹⁷⁶ The *Eshelman II* court also noted that these awards may not be appropriate in all circumstances, and courts must look to the facts of the case and the evidence offered by the plaintiff when determining tax gross-up awards.¹⁷⁷

B. The District of Columbia and Eighth Circuits: Closed Doors? Or Open Windows?

1. The District of Columbia Circuit Approach: Nothing Authorizes Tax Gross-Ups

In 1993, the District of Columbia Circuit addressed the issue of tax gross-up awards for the first time in *Dashnaw v. Peña*.¹⁷⁸ In *Dashnaw*, the court stated only that it "[knew] of no authority for such relief, and appellee point[ed] to none."¹⁷⁹ This represents the extent of the court's reasoning for not allowing tax gross-ups in discrimination cases. Subsequent case law exposes the inadequacies in the court's bare reasoning. For example, in *Fogg v. Gonzales (Fogg IV)*, the District of Columbia Circuit once again faced the issue in a Title VII case alleging race discrimination.¹⁸⁰ Fogg attempted to distinguish his case from *Dashnaw*, arguing that not only were the facts and amounts different, but that the district judge who allowed the gross-up in his case "had been a member of the panel that decided *Dashnaw* and she presumably saw no inconsistency between the present case and that precedent."¹⁸¹ Fogg also cited *Sears II*, both as support for his facts and, presumably, to show the court its

(10th Cir. 1984) (reasoning only that gross-ups are included in the broad equitable discretion of trial courts).

174. *Eshelman II*, 554 F.3d at 442.

175. *Id.* at 441-42.

176. *Id.* at 442 (citing *Loeffler v. Frank*, 486 U.S. 549, 557 (1988)). In *Loeffler*, the Supreme Court recognized that "apparently all the United States Courts of Appeals that have considered the question agree, that Title VII authorizes prejudgment interest" on backpay awards. *Loeffler*, 486 U.S. at 557.

177. *Eshelman II*, 554 F.3d at 442. The court favorably cited *Sears II* in reaching its holding. *Id.* at 441.

178. See *Dashnaw v. Peña*, 12 F.3d 1112, 1113, 1116 (D.C. Cir. 1994) (per curiam).

179. *Id.* at 1116.

180. *Fogg v. Gonzales (Fogg IV)*, 492 F.3d 447, 449 (D.C. Cir. 2007).

181. *Id.* at 455-56.

error in *Dashnaw* of not even considering that case.¹⁸² Interestingly, the *Fogg IV* court did not discuss the merits of *Sears II* or *Fogg*'s argument.¹⁸³ Rather, the court simply concluded that, "[o]n the basis of binding circuit precedent," it had to reverse the district court's gross-up award.¹⁸⁴

As the law currently stands, tax gross-ups are not allowed by the District of Columbia Circuit.¹⁸⁵ The court failed to discuss why gross-ups are inappropriate—as compared to prejudgment interest awards, for example. Yet, the application of the District of Columbia's approach can be limited by a fact shared in *Dashnaw* and *Fogg IV*: the defendant in each case was the federal government.¹⁸⁶ It may be that these cases represent an unwillingness to apply tax gross-ups against the government absent an express waiver of sovereign immunity.¹⁸⁷ If the District of Columbia Circuit's wariness of treading on sovereign immunity motivated the *Dashnaw* and *Fogg* decisions, the question of whether Title VII authorizes gross-ups against *private* employers in the District of Columbia Circuit may be ripe for judicial review.¹⁸⁸

2. The Eighth Circuit: Almost There

The Eighth Circuit has declined to award tax gross-ups to plaintiffs within its jurisdiction on two occasions.¹⁸⁹ Yet, the court's decisions in *Hukkanen v. International Union of Operating Engineers* and *Arneson v. Callahan* leave conspicuously unanswered the question of whether tax gross-ups can be awarded against *private* employers.¹⁹⁰ In *Arneson*, as in *Dashnaw* and *Fogg IV*, the plaintiff filed suit against the federal government.¹⁹¹ The Eighth Circuit denied the award because Congress had not explicitly waived sovereign

182. Brief for Appellee/Cross Appellant at 17–19, *Fogg v. Gonzales (Fogg IV)*, 492 F.3d 447 (D.C. Cir. 2007) (No. 05-5439). Although *Sears II* was decided in 1984, a full ten years before *Dashnaw*, the *Dashnaw* opinion never mentioned it. See *Dashnaw*, 12 F.3d at 1114–15.

183. *Fogg IV*, 492 F.3d at 456.

184. *Id.*

185. See *id.*

186. *Id.* at 449 (noting that the appellant was the USMS); *Dashnaw*, 12 F.3d at 1113 (noting that the appellant was the Department of Transportation).

187. See *infra* Part II.B.2. *Dashnaw* was also a per curiam opinion and is thus more vulnerable to future attack. *Dashnaw*, 12 F.3d at 1113.

188. Of course, it is speculative to suggest that the District of Columbia Circuit Court based its reasoning predominantly on sovereign immunity grounds. However, given the weak reasoning of both *Dashnaw* and *Fogg IV*, plaintiffs seeking tax gross-ups in suits against private employers would do well to distinguish their employers from the government agencies in *Dashnaw* and *Fogg*.

189. *Arneson v. Callahan*, 128 F.3d 1243, 1247 (8th Cir. 1997); *Hukkanen v. Int'l Union of Operating Eng'rs*, 3 F.3d 281, 287 (8th Cir. 1993).

190. *Arneson*, 128 F.3d at 1247 n.7 ("Because we believe Congress has not unequivocally expressed its intention to waive the federal government's sovereign immunity from this tax enhancement award, we need not decide whether plaintiffs may recover this type of award against private parties."); *Hukkanen*, 3 F.3d at 287 (failing to address this issue).

191. *Arneson*, 128 F.3d at 1244–45.

immunity for gross-up awards.¹⁹² The defendant in *Arneson*, however, argued primarily that Title VII does not allow tax gross-ups.¹⁹³ The holding on alternative grounds may imply that the court did not wish to preclude allowing those awards against private employers.¹⁹⁴ *Hukkanen*, meanwhile, only addressed the inadequacy of the plaintiff's factual showing of circumstances warranting a gross-up award at trial.¹⁹⁵ Therefore, given an adequate showing by the plaintiff against a private employer, the Eighth Circuit may be inclined to allow tax gross-ups on discrimination backpay awards against *private* employers.

III. USING TITLE VII'S BROAD REMEDIAL POWER THE WAY CONGRESS INTENDED

A. Tax Gross-Up Awards Are Well Within Congress's Broad Grant of Equitable Remedies

The Third Circuit's proposition is simple: when Congress enacted Title VII, expanded courts' powers and plaintiffs' awards after subsequent developments, and modeled other discrimination statutes on Title VII's remedies, it did *not* intend to tie the hands of the courts in exercising proper discretion.¹⁹⁶ Rather, Congress has consistently expressed its intention that courts broadly interpret discrimination statutes.¹⁹⁷ A plain-language reading of Title VII, as noted by

192. *Id.* at 1247; see *Library of Cong. v. Shaw*, 478 U.S. 310, 314–15 (1986) (noting that unless the United States expressly waives its sovereign immunity, it is not liable for prejudgment interest or other awards authorized by discrimination statutes). *But see* *Loeffler v. Frank*, 486 U.S. 549, 554, 556–57 (1988) (concluding that because Congress expressly waived sovereign immunity with respect to the Postal Service by including a “sue-and-be-sued” clause in the statute enumerating the Postal Service’s general powers, the plaintiffs could collect interest awards).

193. *Arneson*, 128 F.3d at 1247 (“The SSA argues that tax enhancement awards are not available under Title VII and that, if available, Congress has not waived sovereign immunity from these awards.”). The opinion stated that if Title VII did authorize the award, it was similar to a prejudgment interest award. *Id.*; see *supra* Part I.A.4 (discussing prejudgment interest awards).

194. *Cf.* *Washington v. Kroger Co.*, 671 F.2d 1072, 1078 (8th Cir. 1982) (“The defendant is, by hypothesis, the wrongdoer, and has had the use of plaintiff’s money for years. We approve the award of prejudgment interest.”). Because nearly all of the circuits had permitted prejudgment interest awards against private employers before Congress amended Title VII, the Eighth Circuit’s language in *Arneson* could indicate a willingness to allow tax gross-ups against private employers under the right circumstances.

195. *Hukkanen*, 3 F.3d at 287. *Hukkanen* upheld the district court’s denial of a tax gross-up award because the plaintiff failed to present evidence or give the court a “convenient way . . . to calculate the amount.” *Id.*

196. See *Eshelman v. Agere Sys., Inc. (Eshelman II)*, 554 F.3d 426, 440 (3d Cir. 2009) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 424 (1975)). Essentially, the Third Circuit interpreted Title VII as evincing Congress’s intent to give the courts a nearly limitless range of remedies to create “a just result” for victims of discrimination. *Id.*

197. See H.R. REP. NO. 102-40, pt. 1, at 87–88 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 625–26 (discussing Congress’s ongoing concern regarding civil rights laws). The report goes on to state

the Supreme Court in *Albemarle Paper Co. v. Moody*, establishes a clear “make-whole” purpose behind remedy provisions designed to put plaintiffs in the positions they would have been in but for the discrimination.¹⁹⁸

Congressional approval of prejudgment interest awards indicates that Congress would likely endorse a similar logic in accepting tax gross-up awards.¹⁹⁹ It is altogether fitting that plaintiffs should be taxed as they would have been had they not been subjected to discrimination.²⁰⁰ In this respect, the proper interpretation of Title VII is the broad, liberally construed grant of authority that the Third Circuit articulated in *Eshelman II*.²⁰¹ Although Congress has been repeatedly presented with legislation to amend the I.R.C. for discrimination plaintiffs,²⁰² its failure to address the issue adequately leaves courts with the choice to continue the injustice worked on discrimination plaintiffs or to fashion appropriate relief.²⁰³ Therefore, courts must be allowed to consider the impact of purely monetary awards on plaintiffs if they are to make them “whole” again.

Despite these repeated expressions of Congress’[s] view, the Supreme Court decisions of 1989 addressed in this legislation strongly suggest that the Supreme Court appears to have completely ceased applying [a broad interpretive] rule of construction in civil rights cases. Departure from the established rules of statutory construction, such as the rule favoring broad construction of civil rights laws, interferes with the ability of Congress to express its will through legislation.

Id. at 88, *reprinted in* 1991 U.S.C.C.A.N. at 626. The 1991 CRA was viewed by lawmakers as an opportunity to codify this liberal rule of construction. *Id.*

198. *Albemarle*, 422 U.S. at 419.

199. See H.R. REP. NO. 102-40, pt. 1, at 85–86, *reprinted in* 1991 U.S.C.C.A.N. at 623–24; *see also supra* note 62. It follows logically that the same money taxed in a lump sum—often at the highest margins—is worth less than that money taxed at lower margins over time.

200. See H.R. REP. NO. 102-40, pt. 1, at 86, *reprinted in* 1991 U.S.C.C.A.N. at 624 (“Title VII authorizes the award of interest or other compensation for delay in payment of back pay and attorneys’ fees in actions against private employers as well as state and local governments.” (emphasis added)).

201. See *Eshelman II*, at 440.

202. See GovTrack.us, H.R. 3035: Civil Rights Tax Relief Act of 2009, <http://www.govtrack.us/congress/bill.xpd?bill=h111-3035&tab=related> (last visited July 28, 2010) (noting that the CRTRA and similar bills have failed in at least four previous sessions of Congress). The CRTRA would, among other things, allow for civil rights plaintiffs to average lump-sum payments over several years to offset the increased tax liability of the lump sum. See Nat’l Employment Lawyers Ass’n, Advocacy: CRTRA, <http://www.nela.org/NELA/index.cfm?event=showPage&pg=crtra> (last visited July 28, 2010).

203. See, e.g., *Eshelman II*, 554 F.3d at 440–41 (addressing the injustice that would result under the I.R.C. if *Eshelman* were not awarded a tax gross-up); *see also supra* note 83 and accompanying text.

B. Limitations to Gross-Ups Based on Factual Distinctions

As the Third, Eighth, and Tenth Circuits have demonstrated, it is necessary to establish limitations on tax gross-up awards.²⁰⁴ First, these courts are correct that a typical Title VII case may not warrant tax gross-up awards where the litigation is not protracted or other factors suggest an award would be inappropriate.²⁰⁵ Most likely, the plaintiff's support for a gross-up award would be one of the most contentious matters for the court to decide.²⁰⁶

When awarding backpay, courts should also take into account other pecuniary burdens the plaintiff will suffer as a result of adverse tax consequences. Not all income is taxed equally, and courts should consider not only a plaintiff's *income-tax* liability but also any other liabilities under the I.R.C. that a plaintiff can prove would not have been incurred but for the discrimination.²⁰⁷ Courts should account for missed deductions, tax credits, or other applicable provisions,²⁰⁸ as well as any economic benefits the plaintiffs were unable to enjoy that are traceable to the employer's discrimination.²⁰⁹ For example, if a plaintiff receives federal or state unemployment benefits, the tax consequences and other economic benefits, if any, should be considered when calculating the gross-up award.²¹⁰

204. See *Eshelman II*, 554 F.3d at 441–42 (upholding the propriety of the district court's award and calculations); *Hukkanen v. Int'l Union of Operating Eng'rs*, 3 F.3d 281, 287 (8th Cir. 1993) (upholding the district court's decision not to award a tax gross-up because of the plaintiff's failure to present evidence of tax consequences); *Sears v. Atchison, Topeka & Santa Fe Ry. (Sears)*, 749 F.2d 1451, 1456 (10th Cir. 1984) (considering particular factors, including age, mortality, and position changes, in awarding a tax gross-up to members of a class).

205. See *Sears II*, 749 F.2d at 1456. For example, employees that would have been taxed at the highest rate had they maintained their positions should not be allowed tax gross-ups. The burden is on the plaintiffs to show negative tax consequences for the years in question. See *Hukkanen*, 3 F.3d at 287.

206. See, e.g., *Argue v. David Davis Enters.*, No. 02-9521, 2009 WL 750197, at *26–27 (E.D. Pa. 2009) (denying a tax gross-up award because of the plaintiff's questionable calculations based on only one year's tax return).

207. See *supra* notes 85–91 and accompanying text.

208. See, e.g., GEORGE RUTHERGLEN, *EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE* 180–81 (2d ed. 2007). Courts must also take into account the plaintiff's "[i]nterim earnings or amounts earnable with reasonable diligence." 42 U.S.C. § 2000e-5(g)(1) (2006).

209. *But see, e.g.,* *Randall v. Loftsgaarden*, 478 U.S. 647, 667 (1986) (holding that an award in a securities fraud case should not be reduced for advantageous tax benefits received by defrauded plaintiffs during the years of investment).

210. See, e.g., *Pappas v. Watson Wyatt & Co.*, No. 3:04CV304, 2008 WL 45385, at *11 (D. Conn. Jan. 2, 2008) (denying a tax gross-up for COBRA contributions to reflect the plaintiff's effective tax rate); *EEOC v. Joe's Stone Crab, Inc.*, 15 F. Supp. 2d 1364, 1378 (S.D. Fla. 1998) (holding that backpay should include fringe benefits like "vacation, sick pay, insurance and retirement benefits"). Courts should take into account all of the unemployment effects of a lost salary. The unemployment effects a lack of salary has on the employee should take into account all the lost "salary" itself. Although backpay-award calculation is beyond the scope of this

C. Putting the Burden of Proof on the Plaintiff

As *Eshelman II* holds, in order to recover, the plaintiff should bear the burden of proving with specificity the amount of the increased tax burden.²¹¹ To prevent abuse or mistake in awarding tax gross-ups, courts should require detailed accounting calculations and records supporting a specific figure or estimate.²¹² Courts have held tax gross-ups to be untenable where calculations are too speculative or where there is no “convenient way for the court to calculate the amount” when announcing its judgment.²¹³

This requirement is not as intimidating as it may seem because courts already require detailed computations for backpay awards and take into account any accrued “interim earnings” or other mitigating financial factors.²¹⁴ Where plaintiffs must already apply accounting principles for calculations of backpay offsets,²¹⁵ calculating adverse tax consequences seems only logical. If a plaintiff can be made substantially whole without a tax gross-up award, courts should not grant an award that would put the plaintiff in a better economic position than she otherwise would have been.²¹⁶

While individual circumstances dictate the method of calculating tax gross-ups, courts employ a general method for the calculations: (1) calculate the taxable income of the plaintiff for the year of the award;²¹⁷ (2) determine the

Comment, it is worth noting that backpay awards, when appropriate, often account for many of the negative pecuniary consequences associated with an employee’s loss of salary.

211. See *Eshelman v. Agere Sys., Inc.* (*Eshelman II*), 554 F.3d 426, 443 (3d Cir. 2009) (holding that the plaintiff satisfied her burden by providing expert testimony); see also *Argue*, 2009 WL 750197, at *26–27 (denying a tax gross-up where the expert witness’s calculations did not include all available years of tax returns). These cases demonstrate the uncertainty that remains regarding the burden of proof required in the Third Circuit for proving the need for tax gross-ups.

212. See *Argue*, 2009 WL 750197, at *27 (noting that the plaintiff did not provide “a reliable estimate of the negative income tax consequences of his lump sum award, let alone equitable arguments compelling such an award”). *Argue* is particularly relevant because it is one of the first opinions in the Third Circuit that applied *Eshelman II*. See *id.* at *26. The requirement of detailed, proper calculations set forth by the *Eshelman II* court was not adequately met by the plaintiff in *Argue*. *Id.* at *26–27.

213. *Hukkanen v. Int’l Union of Operating Eng’rs*, 3 F.3d 281, 287 (8th Cir. 1993).

214. See *RUTHERGLEN*, *supra* note 208, at 180 (discussing the requirements of 42 U.S.C. § 2000e-5(g)(1)).

215. See 42 U.S.C. § 1981a(b)(2) (2006) (stating that compensatory damages “shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964”). Given its make-whole scheme, it seems illogical that Congress, while diligent enough to prevent double recovery by plaintiffs, was disinterested in the possibility of double taxation due to large lump-sum payments taxed in a single year.

216. See, e.g., *Criado v. IBM Corp.*, 145 F.3d 437, 446 (1st Cir. 1998) (upholding a denial of a prejudgment interest award because the plaintiff was made whole without such an award).

217. See *Loesch v. City of Philadelphia*, No. 05-cv-0578, 2008 WL 2557429, at *11 (E.D. Pa. June 19, 2008). A plaintiff’s “gross-up income” should include the lump-sum backpay award as well as any other non-judgment-related earnings for the year. *O’Neill v. Sears, Roebuck &*

taxes owed for that year;²¹⁸ (3) determine the effective tax rate for that year;²¹⁹ (4) determine the effective tax rate on what would have been the plaintiff's normal, one-year salary with the discriminating employer;²²⁰ (5) determine the difference between the effective tax rates in a normal salary year and the lump-sum award year;²²¹ and (6) multiply the lump-sum taxable income by the difference between the effective and normal tax rates.²²²

Co., 108 F. Supp. 2d 443, 448 (E.D. Pa. 2000). Thus, the award should not gross-up any liquidated or compensatory damages. *Id.*

218. See *Loesch*, 2008 WL 2557429, at *11. For large backpay awards, the Alternative Minimum Tax (AMT) may be implicated. See 26 U.S.C. § 55 (2008). Without discussing all of the issues attendant to AMT calculations, it will suffice to note that the AMT will not change the general method of calculation for tax gross-up awards. If the AMT is triggered, this will be included as a "negative" consequence of the lump-sum backpay award.

219. See *Loesch*, 2008 WL 2557429, at *11.

220. See *id.* at *11 n.10 ("Defendant's estimate of itemized deductions is based on the deductions actually taken by the Plaintiff in the tax years between 2003 and 2006. . . ."). Courts should look at the tax returns for the years when the discrimination leading to the backpay award occurred, then determine what the plaintiff's deductions and exemptions were, and what each year's effective tax rate would have been on the salary for those years. IRS tax-rate schedules for each year in question should be used. Thus, when computing the normal tax rate for a plaintiff awarded salary increases, experts should consider a plaintiff's actual deductions and exemptions for each year in question, then apply specific yearly promotions as appropriate. For instance, if a backpay award was calculated to assume a five-percent raise every two years, the plaintiff should calculate each year's salary and compute the effective tax rate as appropriate. *Cf. Argue v. David Davis Enters.*, No. 02-9521, 2009 WL 750197, at *27 (E.D. Pa. Mar. 20, 2009) ("[E]stimating the tax impact by using one year as a comparison ignores the fact that information about more than one year is readily available.").

221. *Loesch*, 2008 WL 2557429, at *11.

222. *Id.* A simple (and unrealistic) model illustrates this approach:

Taxable Income	\$1,000,000.00
Tax	\$200,000.00
Effective Tax Rate (married filing jointly)	20.00%
Normal Tax Rate on "Normal Salary" of \$100,000.00	10.00%
Tax Increase	10.00%
Additional Tax on Lump Sum	\$100,000.00

The goal of tax gross-ups is to *completely* offset the negative tax burden; that is, to tax the award year's gross income (including both backpay and the gross-up) and end up with the same after-tax amount as if the plaintiff had continued working, was taxed yearly at the "normal" rate, and stockpiled earnings. Obviously, adding the gross-up award would increase gross income. Consequently, the gross-up amount would fall in the taxpayer's highest margin—or more

Because of the complexities involved in calculating backpay gross-ups, courts should instruct juries on the adverse effects of lump-sum awards.²²³ Calculations should be as straightforward and complete as possible to demonstrate adequately the propriety of a gross-up award.²²⁴ Yet, such factual showings should not be so specific as to allow only those calculations that include no element of speculation.²²⁵ A plaintiff should be able to meet the burden of proof through expert testimony or other affirmative evidence that delineates for the court any complex calculations, non-obvious accounting methods, and applicable I.R.C. provisions. The burden of proof should *rest* on the plaintiff, not crush her. Ultimately, the plaintiff must convince the court that only a tax gross-up award can make her “whole.”

IV. CONCLUSION

In over one hundred years of Civil Rights legislation, Congress has reiterated time and again its intent to protect victims of discrimination and to restore them—as best as possible—to their rightful place in society. Over time, with both successes and failures, both Congress and the courts have recognized that making a victim “whole” often requires monetary compensation. The Third and Tenth Circuits have used the broad equitable power bestowed on the courts under Title VII, and the liberal construction which Congress intended, to award tax gross-ups for lump-sum backpay awards to offset undue tax burdens.²²⁶ Both circuits looked to the plaintiffs’ particular circumstances before determining that only tax gross-up awards could make the plaintiffs whole. Conversely, the District of Columbia Circuit, citing only a lack of applicable case law in the area, expressly rejected tax gross-up awards for a prevailing plaintiff’s discrimination claim.²²⁷ By blindly adhering to this position, the District of Columbia Circuit ignores the

realistically, would bump the taxpayer into an even higher margin—shifting the effective tax rate upward. Thus, the \$1,100,000.00 would not be taxed at a twenty percent effective rate, but perhaps at twenty-two percent, once more leaving the plaintiff with less than if she had been paid and taxed “normally.”

223. See Bruce A. Fredrickson, *Taxation, Back Pay, and Attorneys’ Fees in Employment Cases*, GEO. U. L. CENTER CONTINUING LEGAL EDUC., 2003 WL 22002094, at *3 (arguing in support of jury instructions and on the taxability of awards in discrimination cases).

224. See Robert W. Wood, *Getting Additional Damages for Adverse Tax Consequences*, 123 TAX NOTES 423, 428 (2009).

225. See *Loesch*, 2008 WL 2557429, at *11 (“[T]he mere fact that there is an element of speculation involved in calculating the taxes that would have been paid on lost wages does not provide a sound reason for denying the award.”). Using only a few years of tax returns to estimate the plaintiff’s average, normal tax rate, for example, may be permissible where the litigation is prolonged, the discrimination had taken place over many years, and where tax returns or other documents for the years in question cannot be located. Cf. *Argue*, 2009 WL 750197, at *26–27 (holding that a tax gross-up was not warranted where the plaintiff’s expert failed to employ actual tax returns available to the court in his calculations for the years in dispute).

226. See *supra* Parts I.C.1, I.C.3.

227. See *supra* Part I.C.2.

legislative history and intent of Congress, the spirit of discrimination remedies as advanced by the Supreme Court, and common sense. Barring explicit legislative change, courts in the future should adopt the reasoning of the *Eshelman II* court when determining the propriety of tax gross-ups in Title VII backpay awards.